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February 13, 2018

VIA ELECTRONIC FILING

Christopher A. Prine
Clerk, Fourteenth Court of Appeals
301 Fannin, Suite 245
Houston, Texas 77002

Re: Marc Wakefield Dunham v. State
Court of Appeals No. 14-17-00098-CR
Trial Court Case No. 2109329

Dear Mr. Prine:

The Court is scheduled to submit this case to a panel consisting of Justices Boyce, Donovan, and Wise after hearing argument on February 14, 2018. I write this letter pursuant to Texas Rules of Appellate Procedure 2 and 38.7 and respectfully request that the Court grant leave to file it as a supplemental list of authorities.

1. Texas Penal Code § 6.01(c)

The Legislature has established that a person who omits to perform an act does not commit an offense unless a law as defined by Section 1.07 provides that the omission is an offense or otherwise provides that he has a duty to perform the act.

The State asserts in its brief that appellant misrepresented that that he was selling a Central Security alarm system by failing to mention that he worked for a different alarm company until after the complainant allowed him to enter her home. State's Brief at 11. The State essentially argues that the evidence is sufficient to sustain the conviction because appellant omitted that he worked for the Capital Connect alarm company when he first met the complainant at the door to her residence. The offense of deceptive business practice, as alleged under section 32.42(b)(7) of the Penal Code, requires an affirmative act—a representation—and does not expressly provide that a person commits an offense by omission. Nor does that subsection otherwise provide that a person has a duty to inform the complainant that he is selling a particular style, grade, or model of commodity or service. Accordingly, the evidence is insufficient to establish that appellant committed this offense by initially omitting that he worked for Capital Connect instead of Central Security.

2. Irielle v. State, 441 S.W.3d 868 (Tex. App.—Houston [14th Dist.] 2014, no pet.)

This Court held, as a matter of first impression, that the offense of improper sexual activity with a person in custody requires the trial court to instruct the jury in the charge that it must find unanimously that the defendant committed a specific one of five distinct offenses that were grouped in the jury charge. Id. at 876-77. Because the charge did not require unanimity, the trial

court erred. As it relates to appellant's case, this Court rejected the State's similar argument that this was a "circumstances-of-conduct" offense. Although the prohibited sexual conduct is not "per se illegal," and only becomes illegal when it is committed by an employee of a correctional facility on a person in custody, the gravamen of the offense is the nature of the conduct. Offenses that focus on the nature-of-conduct require that the jury unanimously agree on what conduct the defendant committed. Similarly, the prohibited conduct in the deceptive business practice statute requires the circumstance that the conduct occurs "in the course of business." TEX. PENAL CODE § 32.42(b). However, the gravamen of the offense is the conduct enumerated in subsections (b)(1) through (b)(12). Accordingly, as in Irielle, this offense is a "nature-of-conduct" offense that requires jury unanimity.

Because the charge error in Irielle was not preserved, the Court concluded that the error did not result in egregious harm, especially where neither the trial court nor the parties emphasized that jury unanimity was not required. Id. at 878. By contrast, appellant preserved this error; the trial court erroneously instructed the jury in the charge that it need not unanimously agree on which act appellant committed to convict him; and the State emphasized this erroneous instruction during summation.

3. Gillette v. State, 444 S.W.3d 713 (Tex. App.—Corpus Christi 2014, no pet.)

The Thirteenth Court of Appeals held in Gillette that the terroristic threat statute, TEX. PENAL CODE § 22.07, is a "nature-of-conduct" offense that requires jury unanimity. 444 S.W.3d at 729-30. Importantly, as it relates to appellant's case, the Legislature provided different punishment ranges depending on which subsection of the statute was violated. Id. at 728 ("The Legislature's assignment of different punishment ranges to different statute subsections can also indicate the subsections are separate offenses rather than manners of committing a single offense."); id. at 730 ("The disparity in correlative punishment ranges shows the Legislature is not merely outlining different manners of committing the same offense."). That the Legislature views and treats some terroristic objectives more seriously than others shows an intent that each subsection be a separate, punishable offense and that the focus of the statute is on the conduct prohibited rather than the results of the conduct or the circumstances surrounding the conduct.

Similarly, the Legislature provides that six of the subsections in the deceptive business practice statute are Class C misdemeanors if committed with criminal negligence, whereas the other six are Class A misdemeanors regardless of the culpable mental state. See TEX. PENAL CODE §§ 32.42(c) & (d). Appellant asserts that these different punishments based on culpable mental states reflect the Legislature's intent to create a statutory framework of different criminal offenses rather than different manners and means of committing the same offense. Appellant's Brief at 25-26. The State ignores this argument in its brief.

4. O'Brien v. State, 482 S.W.3d 593 (Tex. App.—Houston [1st Dist.] 2015, pet. granted)

The State relies substantially on the First Court of Appeals' decision in O'Brien for the proposition that the jury need not unanimously agree on which act appellant committed. State's Brief at 19-21. The State acknowledges in its citation that the Court of Criminal Appeals granted discretionary review in O'Brien. However, the State fails to mention that the issue on which

review was granted was the proposition of law on which it relies in appellant's case. The Court of Criminal Appeals is reviewing, "Whether the court of appeals erred in holding that unanimity is not required with respect to the enumerated offenses of theft and money laundering in an engaging in organized criminal activity by commission jury charge." See http://www.txcourts.gov/media/1440473/pdrissues02072018.pdf (last viewed on February 13, 2018). Should O'Brien factor in this Court's resolution of the unanimity issue in appellant's case, it should wait for the Court of Criminal Appeals to resolve the issue.

I appreciate your bringing this letter to the Court's attention.

Sincerely,

/s/ Josh Schaffer
Josh Schaffer

JS/

cc: Katie Davis